

Memorandum 78-57

Subject: Study F-30.300 - Guardianship-Conservatorship Revision (Special Procedure for Authorization for Medical Treatment)

At the last meeting, the Commission directed the staff to draft provisions authorizing medical treatment for an adult without the establishment of a permanent conservatorship of the person. The staff has concluded that a separate procedure, based on the provision of the proposed guardianship-conservatorship statute relating to court-ordered medical treatment, would provide the best solution to this problem. The statute proved to be fairly simple.

The attached materials consist of:

- (1) A draft of the preliminary portion of the recommendation which outlines the new statutory provisions (pink).
- (2) A staff draft of the new statutory provisions (green).

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Authorization for Medical Treatment of Adult
Without Creating Conservatorship

In the ordinary, nonemergency case, medical treatment may be given to an adult only with that person's informed consent.¹ If the person is incompetent or is otherwise unable to give informed consent, some kind of substitute decision-making process is necessary.² One alternative is the establishment of a conservatorship of the person so that the court or conservator may make medical decisions for the conservatee.³ However, in some cases there is no ongoing need for conservatorship, and all that is needed is an expeditious means of obtaining authorization for a specific course of medically recommended treatment.

The proposed law therefore includes new provisions for a special court proceeding for court authorization of medical treatment when the patient has no conservator but is unable to give informed consent to the treatment. The petition may be filed by the patient, a spouse, relative, or friend of the patient, a medical facility in which the patient is located, or by any other interested person. The petition may be filed in the county where the patient resides or is temporarily living, or in such other county as may be in the patient's best interests. The petition is required to set forth the pertinent medical details. If the patient has not retained an attorney and does not plan to retain one, the court is required to appoint the public defender or private counsel. Notice of the hearing must be given to the patient and the patient's attorney, and to such other persons as the court may require. The attorneys for the petitioner and for the patient may stipulate that the matter be decided on the basis of the medical affidavits submitted. The court may make an order authorizing treatment only if the patient is unable to give informed consent, and the court has continuing jurisdiction to revoke or modify its order.

-
1. Cobbs v. Grant, 8 Cal.3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).
 2. See Aden v. Younger, 57 Cal. App.3d 662, 682, 684, 129 Cal. Rptr. 535, ___, ___ (1976).
 3. See discussion under "Guardian or Conservator of the Person-- Medical Treatment for Ward or Conservatee" supra.

The new procedure for court authorization of medical treatment where the patient has no conservator is not the exclusive method of authorizing such treatment, but is in addition to the methods that exist under present law.⁴

4. See generally *Cobbs v. Grant*, 8 Cal.3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

PART 7. AUTHORIZATION OF MEDICAL TREATMENT FOR ADULT
WITHOUT CONSERVATOR

§ 3200. Patient defined

3200. As used in this part, "patient" means an adult who does not have a conservator of the person and who is in need of medical treatment.

Comment. Section 3200 is new.

§ 3201. Petition for court authorization for medical treatment

3201. If a patient requires medical treatment for an existing or continuing medical condition and the patient is unable to give an informed consent to such medical treatment, a petition may be filed under this part for an order authorizing such medical treatment and authorizing the petitioner to give consent to such treatment on behalf of the patient.

Comment. Section 3201 is similar to a portion of subdivision (b) of Section 2357. In the ordinary, nonemergency case, medical treatment may be given to a person only with the person's informed consent. See *Cobbs v. Grant*, 8 Cal.3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972). If the person is incompetent or is otherwise unable to give informed consent and has no conservator, the physician may be willing to proceed with the consent of the person's nearest relative. See *id.* at 244, 502 P.2d at ____, 104 Cal. Rptr. at ____. However, if consent satisfactory to the physician cannot be obtained, court intervention is needed to authorize the treatment and to protect medical personnel from later legal action based upon asserted lack of consent.

The provisions of this part afford an alternative to establishing a conservatorship of the person where there is no ongoing need for a conservatorship. The procedural rules of this part are designed to provide an expeditious means of obtaining authorization for medical treatment while safeguarding the basic rights of the patient: The patient has a right to counsel (Section 3205) and the hearing is held after notice to the patient and the patient's attorney and such other persons as the court orders (Section 3206). The court may determine the issue on medical affidavits alone if the attorney for the petitioner and the attorney for the patient so stipulate. Section 3207. The court may not order medical treatment under this part if the patient has the capacity to give informed consent to the treatment but refuses to do so. See Section 3208(b).

CROSS-REFERENCES

Petition must be verified, § 1430

§ 3202. Jurisdiction and venue

3202. The petition may be filed in the superior court of any of the following counties:

- (a) The county in which the patient resides.
- (b) The county in which the patient is temporarily living.
- (c) Such other county as may be in the best interests of the patient.

Comment. Section 3202 provides liberal venue rules for determining the county in which the petition is to be filed. See the Comment to Section 2201.

§ 3203. Who may file petition

3203. A petition may be filed by any of the following:

- (a) The patient.
- (b) The spouse of the patient.
- (c) A relative or friend of the patient or other interested person.
- (d) The medical facility in which the patient is located if the patient is in a medical facility.

Comment. Section 3203 permits any interested person to file a petition under this part, including the medical facility if the patient is in a medical facility.

§ 3204. Contents of petition

3204. The petition shall state, or set forth by medical affidavit attached thereto, all of the following so far as is known to the petitioner at the time the petition is filed:

- (a) The nature of the medical condition of the patient which requires treatment.
- (b) The recommended course of medical treatment which is considered to be medically appropriate.
- (c) The threat to the health of the patient if authorization for the recommended course of treatment is delayed or denied by the court.
- (d) The predictable or probable outcome of the recommended course of treatment.
- (e) The medically available alternatives, if any, to the course of treatment recommended.
- (f) The reasonable efforts made to obtain an informed consent from the patient.

(g) If the petition is filed by the medical facility, the name of the person to be designated to give consent to the recommended course of treatment on behalf of the patient.

Comment. Section 3204 is comparable to subdivision (c) of Section 2357.

§ 3205. Appointment of legal counsel if necessary

3205. Upon the filing of the petition, the court shall determine the name of the attorney the patient has retained to represent the patient in the proceeding under this part or the name of the attorney the patient plans to retain for that purpose. If the patient has not retained an attorney and does not plan to retain one, the court shall appoint the public defender or private counsel under Section 1471 to consult with and represent the patient at the hearing on the petition.

Comment. Section 3205 is designed to assure that the patient has legal counsel in a proceeding under this part.

§ 3206. Notice of hearing

3206. (a) Notice of the time and place of the hearing on the petition shall be given for the period and in the manner prescribed by order of court. In determining the period of notice to be required, the court shall take into account (1) the existing medical facts and circumstances set forth in the petition or in the medical affidavit attached to the petition or in a medical affidavit presented to the court and (2) the desirability, where the condition of the patient permits, of giving adequate notice to all interested persons.

(b) A notice of the time and place of the hearing or a copy of the order prescribing the time and place of the hearing, and a copy of the petition, shall be given, as prescribed in the order, to all of the following:

- (1) The patient.
- (2) The attorney for the patient.
- (3) Such other persons, if any, as the court in its discretion may require in the order, which may include the spouse of the patient and any known relatives of the patient within the second degree.

Comment. Section 3206 is comparable to subdivisions (e) and (f) of Section 2357.

CROSS-REFERENCES

Proof of giving of notice, § 1468

§ 3207. Submission for determination on medical affidavits

3207. Notwithstanding Section 3206, the matter presented by the petition may be submitted for the determination of the court upon the proper and sufficient medical affidavits if the attorney for the petitioner and the attorney for the patient so stipulate and further stipulate that there remains no issue of fact to be determined.

Comment. Section 3207 is comparable to subdivision (g) of Section 2357.

§ 3208. Order authorizing treatment

3208. (a) The court may make an order authorizing the recommended course of medical treatment of the patient and designating a person to give consent to the recommended course of medical treatment on behalf of the patient if the court determines from all of the evidence presented to the court all of the following:

- (1) The existing or continuing medical condition of the patient requires the recommended course of medical treatment.
- (2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical health of the patient.
- (3) The patient is unable to give an informed consent to the recommended course of treatment.

(b) If the patient has the capacity to give an informed consent to the recommended course of medical treatment but refuses to do so, the court is not authorized to make an order under this part. If an order has been made under this part, the order shall be revoked if the court determines that the patient has recovered the capacity to give informed consent to the recommended course of medical treatment.

Comment. Subdivision (a) of Section 3208 is comparable to subdivision (h) of Section 2357. Subdivision (b) makes clear that this part applies only to the case where the patient either lacks the capacity to give informed consent or is in such a condition that the patient is unable to give such consent.

§ 3209. Continuing jurisdiction of court

3209. The court in which the petition is filed has continuing jurisdiction to revoke or modify an order made under this part upon a petition filed, noticed, and heard in the same manner as an original petition filed under this part.

Comment. Section 3209 gives the court continuing jurisdiction to make such further orders as are necessary concerning the medical treatment of the patient. If the court determines that the patient has recovered capacity to give informed consent, the order under this part must be revoked. See Section 3208(b). The patient can then determine whether to consent or to refuse to consent to continuation of the treatment.

§ 3210. Procedure supplemental and alternative

3210. (a) This part is supplemental and alternative to other procedures or methods for obtaining medical consent.

(b) The enactment of this part is not to be construed to limit the providing of medical treatment in an emergency case in which the medical treatment is required because the patient has a medical condition which, if not immediately diagnosed and treated, will lead to disability or death.

Comment. Subdivision (a) of Section 3210 makes clear that this part is permissive not mandatory. See the Comment to Section 3201. Subdivision (b) makes clear that the enactment of this part does not by implication impose a requirement of informed consent of the patient in emergency cases where such consent cannot reasonably be obtained. Such cases are governed by whatever law otherwise is applicable. See generally *Cobbs v. Grant*, 8 Cal.3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).